BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICARDA GONZALEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,622
EVANGELICAL LUTHERAN GOOD SAMARITAN	)	
Respondent	)	
AND	)	
	)	
SENTRY INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 1, 2003 Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on October 17, 2003, in Wichita, Kansas.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that she injured her back on January 10, 2001, while lifting a patient at respondent's nursing home. In the May 1, 2003 Award, Judge Fuller awarded claimant a 10 percent permanent partial general disability. The Judge ruled that after the back injury claimant was terminated for cause and, therefore, her permanent partial general disability was limited to her whole body functional impairment rating. The Judge also denied claimant's request to order respondent and its insurance carrier to pay $3,684.17 in emergency room bills that claimant had incurred seeking treatment for her pain.

Claimant contends Judge Fuller erred. Claimant argues she returned to work after the accident on a part-time basis but she neither earned, nor was capable of earning, at least 90 percent of her pre-injury wage and, therefore, she is entitled to a work disability (a permanent partial general disability greater than the functional impairment rating). Also, claimant argues "her termination was nothing but a ruse."[1] Finally, claimant argues she incurred the emergency room bills because she was in a great deal of pain. Accordingly, claimant requests the Board to find that she has either an 85.73 percent or 100 percent wage loss and a 38 percent task loss, which creates a work disability of either 62 percent or 69 percent. Furthermore, claimant requests the Board to order respondent and its insurance carrier to pay or reimburse the emergency room bills.

Conversely, respondent and its insurance carrier request the Board to affirm the Award. They argue claimant should not receive a work disability as she was terminated for cause. In the alternative, they argue that claimant has a 25 percent wage loss and either a 13 percent or 24 percent task loss, which would yield either a 19 percent or 24.5 percent work disability. Regarding the emergency room bills, respondent and its insurance carrier argue that claimant had an authorized treating physician who was treating her pain and, therefore, the emergency room visits should be considered to be unauthorized medical treatment.

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?

2. Should respondent and its insurance carrier pay the emergency room bills that claimant incurred?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and after considering the parties' arguments, the Board finds and concludes:

The Award should be modified to grant claimant a 26 percent permanent partial general disability.

1. What is claimant's functional impairment?

On January 10, 2001, claimant injured her back while working as a nurses' aide at respondent's nursing home. The greater weight of the evidence establishes that claimant

[1] Claimant's Submission Letter at 14 (filed Dec. 30, 2002).

herniated the disc between the fifth lumbar and first sacral vertebrae as a result of that accident. The herniated disc is confirmed by both a CT scan and a MRI.

Following the accident, claimant received medical treatment from Dr. J. Raymundo Villanueva, who specializes in physical medicine and rehabilitation. Dr. Villanueva treated claimant from late January through March 9, 2001, and again from August 22 through October 10, 2001, when he discharged claimant from his care. Despite the treatment provided by Dr. Villanueva, including increased dosages of Oxycontin (which is one of the strongest oral pain medications in existence), claimant reported little improvement in her symptoms. At their last visit, the doctor advised claimant to consider low back surgery. The record discloses that claimant had an October 2001 appointment scheduled with a Dr. Garcia, but the record does not disclose the results of that visit, if it occurred.

In March 2001 Dr. Villanueva referred claimant to orthopedic surgeon Dr. Alok Shah for a surgical consultation. Dr. Shah first saw claimant on April 1, 2001, and diagnosed a herniated disc at L5-S1. While being treated by Dr. Shah, claimant underwent a series of two cortisone epidurals. But when claimant declined low back surgery and declined a CT guided cortisone nerve block, Dr. Shah determined he had nothing more to offer claimant and released her with a recommendation that she return to her family doctor for any additional treatment or pain management.

The record discloses that by either late March or early April 2001 claimant had begun making numerous visits to the emergency room, complaining of severe back pain. The record also discloses that claimant incurred at least $3,684.20 in emergency room bills for the period from April 22 through December 24, 2001. According to Dr. Shah's April 4, 2001 office notes, claimant's first visit to the emergency room occurred sometime before that date. Claimant testified at the October 2002 regular hearing that she quit going to the emergency room because respondent and its insurance carrier would not pay for those visits. According to claimant, she last went to the emergency room in July 2002.

The doctors' opinions regarding claimant's ability to work are quite diverse. Dr. Shah, who initially released claimant to full-time work as of April 20, 2001, restricted claimant to light duty activities with no lifting, no bending, no stooping, and walking no more than four hours per day. Dr. Shah, however, on April 30, 2001, added that claimant should be permitted to go home or lay down if she experienced pain after one hour. And on June 4, 2001, the doctor issued his final release in which he restricted claimant to light duty work sitting down with no lifting. The doctor confirmed those restrictions at his January 2003 deposition and, moreover, testified that claimant should have been able to work sitting down.

The final restrictions that Dr. Villanueva placed on claimant, which were issued September 26, 2001, limited claimant to light work for no more than four to six hours per

day with no lifting over 20 pounds, no more than two to four hours standing, and only occasional carrying, bending and reaching.

At her attorney's request, in July 2001 claimant saw Dr. Pedro A. Murati to be evaluated for this claim. Dr. Murati diagnosed low back pain secondary to lumbosacral strain with radiculopathy, which he rated as comprising a 10 percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.). According to Dr. Murati, claimant needs to lay down every 30 minutes or for 30 minutes every two hours to relieve her back pain. Among other restrictions, the doctor also limited claimant from lifting over 10 pounds more than occasionally, from frequently lifting over five pounds, from bending at the waist, climbing ladders, crawling, and from climbing stairs, squatting and driving more than occasionally.

On the other end of the spectrum are the restrictions from Drs. Philip R. Mills and C. Reiff Brown. In early February 2002, Dr. Mills, who is a specialist in physical medicine and rehabilitation and who was hired by respondent and its insurance carrier, examined claimant and diagnosed back sprain and bulging discopathy. Dr. Mills concluded claimant had sustained a five percent whole body functional impairment under the AMA *Guides*. Believing symptom magnification was present, the doctor determined that claimant should be restricted from prolonged or repetitious forward flexion, twisting and bending, and from lifting over 35 pounds. The doctor also believed that claimant should work only with good body mechanics. The doctor did not limit the number of hours per day that claimant could work. Dr. Mills also concluded that claimant's herniated disc did not encroach on any nerves because the MRI indicated that the protrusion was paracentral, which would not affect the nerves at the foramina. The doctor concluded claimant was not a surgical candidate due to her obesity and symptom magnification.

Dr. Brown, who is an orthopedic surgeon, also examined claimant in early February 2002 at claimant's attorney's request. Dr. Brown diagnosed a herniated disc at L5-S1 and rated claimant as having a 10 percent whole body functional impairment under the *Guides.* According to Dr. Brown, claimant should avoid occasional lifting over 40 pounds, frequent lifting over 20 pounds, and avoid frequent flexion and rotation of the lumbar spine greater than 30 degrees. Dr. Brown did not limit the number of hours per day that claimant could work. The doctor concluded claimant was not a surgical candidate primarily due to her obesity and, moreover, because her symptoms were not severe enough.

The Judge determined that claimant sustained a 10 percent whole body functional impairment as rated by the AMA *Guides* due to the January 2001 accident at work. The Board finds no reason to disturb that finding as it conforms with Dr. Brown's medical opinion, which the Board finds persuasive.

2. What is claimant's permanent partial general disability?

Because claimant has sustained an injury that is not listed in the "scheduled injury statute," K.S.A. 44-510d, claimant's permanent disability benefits are governed by the formula set forth in K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[2] and *Copeland*.[3] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of the permanent partial general disability formula, that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages received when the

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

Moreover, the Kansas Court of Appeals in *Watson*[5] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that in those situations the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

Following the January 2001 accident, claimant returned to work for respondent on a part-time basis and performed light duty work through the latter part of October 2001. When claimant attempted to return to work for respondent in January 2002, she was terminated for failing to call in to work and for an October 2001 incident in which she allegedly yelled at coworkers in front of several nursing home residents. In addition to the October 2001 incident, claimant had previously been admonished for arguing with respondent's office manager and on another occasion admonished for calling respondent's nursing home administrator a liar.

Aside from the alleged violations of respondent's no show/no call policy, the Board concludes that respondent had just cause to terminate claimant after the October 2001 incident due to her conduct. Accordingly, the Board concludes that claimant did not make a good faith effort to retain her employment with respondent and, therefore, a post-injury wage should be imputed to claimant for purposes of the permanent partial general disability formula.

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[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[6] *Id.* at Syl. ¶ 4.

The Board is persuaded by the work restrictions as formulated by Dr. Brown and Dr. Mills. Those restrictions do not limit the number of hours that claimant could work. Those restrictions also would not prevent claimant from performing the light duty work that respondent made available to claimant after the accident. Accordingly, the Board finds that had claimant not caused her termination from respondent's employ, claimant retained the ability to earn $8.64 per hour, which was her pre-injury wage rate, working 40 hours per week for a $345.60 average weekly wage. Comparing that post-injury average weekly wage to the stipulated $509.72 pre-injury average weekly wage yields a wage loss of 32 percent.

The Board notes that claimant contends that she was severely limited in the number of hours that she could perform the light duty work that respondent provided after the accident. But the Board does not find claimant's testimony particularly credible.

Reviewing the task list prepared by vocational rehabilitation counselor James Molski, Dr. Brown determined that claimant had lost the ability to perform seven of 29, or 24 percent, of the work tasks that she had performed in the 15-year period before her accident. On the other hand, Dr. Mills reviewed that same list and determined that claimant had lost the ability to perform six of 29, or 21 percent, of her former work tasks. Dr. Mills also reviewed a task list prepared by vocational rehabilitation counselor Karen Crist Terrill and testified that claimant had lost the ability to perform seven of 53, or 13 percent, of her former work tasks. Accordingly, claimant's task loss lies somewhere between 13 and 24 percent. Averaging those percentages, the Board concludes that claimant has lost the ability to perform 19 percent of her former work tasks due to the January 2001 accident.

When the 32 percent wage loss is averaged with the 19 percent task loss, a 26 percent permanent partial general disability results.

3. Should respondent and its insurance carrier pay the outstanding emergency room bills?

Respondent and its insurance carrier should pay the outstanding emergency room bills.

Neither party presented an expert medical opinion addressing whether claimant's emergency room bills were reasonable and necessary. Dr. Shah testified that the number of claimant's emergency room visits appeared unusually high, but he was unable to say whether the visits were necessary or not. A review of the records generated from those emergency room visits, however, indicates that claimant was treated, which would indicate that medical treatment was appropriate. In fact, on one occasion in late April 2001 claimant was admitted to the hospital and discharged days later. And on some other

occasions, claimant sought emergency room treatment when she had no authorized treating physician.

The Board concludes that under these particular circumstances the emergency medical treatment provided claimant was reasonable in light of the circumstances and, therefore, should be paid by respondent and its insurance carrier as authorized medical benefits.

For future reference, the parties are encouraged to introduce only those records that are material to the issues. Moreover, doctor and hospital records may contain many documents that have little, if any, evidentiary value that only needlessly burden the record.

AWARD

WHEREFORE, the Board increases claimant's permanent partial general disability from 10 percent to 26 percent.

Ricarda Gonzalez is granted compensation from Evangelical Lutheran Good Samaritan and its insurance carrier for a January 10, 2001 accident and resulting disability. Based upon an average weekly wage of $509.72, Ms. Gonzalez is entitled to receive 20.57 weeks of temporary total disability benefits at $339.83 per week, or $6,990.30.

For the period from June 4, 2001, through February 4, 2002, Ms. Gonzalez is entitled to receive a total of $3,061.39 in temporary partial disability benefits.

Commencing February 5, 2002, Ms. Gonzalez is entitled to receive 104.11 weeks of permanent partial general disability benefits at $339.83 per week, or $35,379.70, for a 26 percent permanent partial general disability.

The total award is $45,431.39.

As of October 31, 2003, Ms. Gonzalez is entitled to receive 20.57 weeks of temporary total disability compensation at $339.83 per week in the sum of $6,990.30, plus $3,061.39 in temporary partial disability compensation, plus 90.57 weeks of permanent partial general disability compensation at $339.83 per week in the sum of $30,778.40, for a total due and owing of $40,830.09, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $4,601.30 shall be paid at $339.83 per week until paid or until further order of the Director.

Respondent and its insurance carrier are responsible for the outstanding emergency room bills that were incurred through the date of regular hearing.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director